No. 12028

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ERNEST H. BRIDGMAN and JAY C. HENSON,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Appeal From the United States District Court for the Southern District of California Central Division

---

HON. JACOB WEINBERGER, JUDGE.

APPELLANT HENSON'S WRITTEN ARGUMENT.

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APPELLANT HENSON'S WRITTEN ARGUMENT.

May It Please the Court and Counsel for the Government:

Appellant Henson respectfully submits the following written arguments pursuant to leave granted in lieu of oral argument:

The indictment under which the defendants were prosecuted specifically charges that from August 14, 1945, and continuing to November 4, 1947, 27 named defendants devised and intended to devise a scheme and artifice to defraud purchasers and prospective purchasers of certain vending machines, and to obtain money and property by means of false and fraudulent schemes—well knowing at

the time that the pretenses, representations and promises would be false when made. The theory of the Government's case, set forth in the indictment, and the Government's statement of the case on page 3 of Appellee's Brief, charges the defendants with devising a single scheme, specifying 18 overt acts, in separate counts, and using the United States mails to defarud.

No person can be convicted of the offense of using the mails to defraud unless it be shown beyond a reasonable doubt that he knowingly devised a scheme to defraud and that the mails were used in furtherance of it. The offense is one requiring specific intent—without which the offense cannot be committed. Because of this, good faith of the accused is a complete defense.

United States v. Corlin, 44 Fed. Supp. 940, 947.

During the trial, and on page 14 of Appellee's Brief, the Governnment has repeatedly cited the *Blumenthal* case, which may be readily distinguished from the case at Bar in that in the *Blumenthal* case, there was a single conspiracy relative to illegal liquor transactions, and all of the defendants knew that it was illegal. In the case at Bar, the vending or automatic machine business is a respectable and accepted business in the United States. [See Defendants' Exhibit EE—United States Department of Commerce Bulletin on vending machines.]

Appellant Henson respectfully submits that the cases of *United States v. Kotteakos,* 328 U. S. 750, and *United States v. Corlin,* 44 Fed. Supp. 940, at 949, more accurately apply to this case, both as to the facts and the law, as appellant will point out.

To show the absence of the specific intent to defraud, and to show the good faith of the appellant Henson, and to further show the complete insufficiency of the evidence to prove a scheme, Appellant Henson respectfully points out the undisputed evidence relative to himself and the vending machine business.

Appellant Henson had no experience with vending machines [R. 5439], and answered an innocent advertisement in a Los Angeles paper placed by defendant, Earl H. Rhodes, inviting him to invest in machines himself [R. 5404]. In responding to said advertiseemnt, Appellant Henson met defendant Earl H. Rhodes for the first time [R. 5404, 5323, 5436]. At that time, approximately November, 1945 [R. 5436], Appellant Henson's status was that of a traveling salesman, selling a book entitled "Thunder God's Gold" [Exhibit N-4, R. 5393].

Appellant Henson saw defendant Earl H. Rhodes twice [R. 5404, 5407]. Henson personally investigated Rhodes by checking his references, to wit: Dunn and Bradstreet in Los Angeles, and the Security First National Bank in Los Angeles [R. 406, 415]. Both gave defendant Rhodes a good credit rating [R. 5405, 5406]. Appellant Henson went home and talked it over with his wife; the following day, to satisfy himself of the possibility of getting locations for vending machines, Henson went out with a locator of defendant Rhodes, and discovered that in three-hours' time, the locator got forty locations [R. 5407].

Following that investigation by appellant Henson, Henson signed a distributor's sales contract [Exhibit K-4], and became one of seventy or more distributors [R. 207]. Appellant Henson then undertook selling the vending machines as an incident to selling the book "Thunder God's

Gold," in the various schools, universities and libraries throughout the Country [R. 5410].

Appellant Henson was interviewed by a postal inspector in Seattle, Washington, and made a full, fair and complete disclosure of all of his activities for two hours, and the postal inspector told him in substance, that so far as he was personally concerned, he could see nothing wrong with what Appellant Henson was doing. This was never denied [R. 5469, Exhibit 154]. Henson gave the postal inspector a list of persons whom he had sold in Seattle November 21, 1945.

Subsequent to the indictment, Appellant Henson again made a full, fair and complete disclosure of his activities to J. H. VanMeter, the Los Angeles postal inspector, and inquired if he had done anything wrong, and was led to believe that his matter might or would be dismissed, but it never was [R. 5426 and 5428]. Appellant Henson attended no meetings with the distributors; the record shows there were none [R. 4334]. Likewise, there was no correspondence between the distributors or the manufacturer, defendant Rhodes, as to activities of distributors [R. 435, 437].

Appellant Henson had never seen or met any of the co-defendants, including Appellant Bridgman [R. 6308] prior to attending the 14 weeks of continuous trial in the Federal District Court except:

a. Defendant Earl H. Rhodes, whom Henson met twice, and

b. Defendant Ernest R. Alexander, who saw Henson once in the office. Alexander was acquitted.

As further evidence of good faith, Appellant Henson had no complaints about the glass in vending machines sold by him because he had cemented the glass in the vending machines with glass cement [R. 5413], and successfully and satisfactorily tested and demonstrated his machines to customer Henry B. Wiesley, by rolling them on a bed [R. 5384, 5413].

Relative to the credibility to be given two witnesses who testified concerning Appellant Henson, Henry B Wiesley [R. 1809] identified Appellant Ernest H. Bridgman as Appellant Henson [R. 1809, 1810], and later admitted [R. 1852] that he had never seen Appellant Bridgman before. Mr. Wiesley, when asked by Counsel for the Government at the conclusion of his testimony, was still unable to identify Appellant Henson [R. 1872]. The witness Wiesley told Defendant Ernest R. Alexander (who was acquitted) in the hall of the Federal Building, that the reason Wiesley could not remember was because he had been drinking at the time [R. 5231, 5232]. This was not denied. Both Mrs. Henson and Appellant Henson testified that Mr. Wiesley had brought a bottle of whiskey to the room [R. 5382]. As evidence of the fact that Henry B. Wiesley's original complaint was entirely different than the complaints of the great majority of the 24 Government witnesses, Mr. Henry B. Wiesley's original complaint was slow deliveries [R. 1864. Exhibit 77], and witness Lawrence H. Liebrand's original complaint was set forth in Exhibit WW [R. 1958, 1974] which reads as follows:

> "Gentlemen: I got my machines in fine shape but cannot place them in the places Mr. Henson contracted for as practically all of those places have ma-

chines which were put in from the time Mr. Henson was there till the time the machines arrived.

"P. S. Do you make a slug ejector and a small bracket for your machine."

Mr. Liebrand had never seen Appellant Henson in his life before [R. 1892], and could not say whether or not the signature was Henson's.

Exhibit A (Distributor's Agreement), typical of the contract which each defendant distributor had with defendant, Earl H. Rhodes, was the only agreement in existence [R. 265, 267].

As further evidence of the absence of any possible scheme, the undisputed and uncontradicted evidence was and is that Defendant Rhodes was the sole owner of the vending machine manufacturing business and employed David McFarland, who took all directions and instructions from Rhodes, as an office manager and bookkeeper, but who saw Appellant Henson only once [R. 70, 84 and 87].

As further evidence of good faith, Henson was still sold on the machines because they had worked as well as any he had ever seen. He did not know of a single failure [R. 5430].

Perhaps the Court wonders why defendant Earl H. Rhodes was not convicted since the great bulk of the evidence was introduced originally concerning Defendant Rhodes, and then, on motion of the Government, was introduced in relation to all of the other defendants. I

would like to digress just a moment and enlighten the Court in so far as the evidence is concerned on why the jury could not agree, and that was principally because of the tremendous volume of evidence showing Mr. Rhodes' good faith, his absence of a specific intent to defraud, and how he dealt with the public as well as his distributors.

Briefly:

Rhodes sold twenty-three thousand one-cent machines [R. 377] and twelve thousand five-cent machines [R. 377].

The Government witness McFarland, Rhodes' bookkeeper and manager, testified there were approximately two hundred complaints received, which were answered by McFarland on instructions from Rhodes [R. 377]. Five per cent of the complaints concerned nuts gumming up in the machines; fifty per cent were slow deliveries; and forty-five per cent were due to some defect or improper operation [R. 422]. The percentage of complaints was about ten per cent.

McFarland further testified that any defective machines, or any and all defective machines returned, were fixed by Defendant Rhodes at his sole cost and expense [R. 380].

Showing Rhodes' good faith further, Gordon B. Mansfield, an inspector, testified the machines were precision-built in that class of sandcasting; that the Government's Exhibit 50 was not a fair exhibit. It would not pass inspection because the base was ground irregular, defective, warped; the coin mechanism was fractured; the

corner of the top had been sawed off; the glass chipped; the lock loose, and was not a fair sample.

Inspector William K. Lawrence testified that ten per cent of the machines were rejected for defects at the factory [R. 4010].

In attempting to produce the best possible machine for the money, defendant Rhodes employed Melvin Christiansen, an experienced tool and die worker, and spent $8,-100.00 with him, perfecting and developing the machine [R. 4052], and Melvin Christiansen testified the vending machines were ninety per cent foolproof and "as good as we could build;" that Exhibit 109-F was precision-made as near as possible to production standards.

Horace J. Burrow [R. 4192], a wood and metal pattern man for 48½ years, testified the machines were precision-built to withstand the purposes for which they were built. Rhodes spent $2,800.00 with Burrow and $9,500.00 on testing the 5 and 1¢ machines.

As further evidence of good faith, the manufacturer, Defendant Earl H. Rhodes, had difficulty getting materials, particularly metal [R. 441, 442, 449].

Briefly, that is why the Defendant Rhodes was not convicted.

As further evidence to negative the theory of the Government on a scheme, I respectfully point out the facts relative to Appellant Bridgman in so far as they concern the Defendant Earl H. Rhodes and Appellant Henson. Appellant Bridgman rented space from the Los Angeles

Manufacturing Company, under a written distributor's agreement [R. 96]. McFarland received checks from Bridgman for rent. Each individual distributor (70 or more) had a written distributor's agreement with the Los Angeles manufacturer, which was Earl H. Rhodes, permitting him to sell vending machines and to purchase them from the manufacturer at an agreed price [R. 205, 207]. Distributors were procured by advertisements in the paper by Defendant Rhodes [R. 214], and that is exactly how Appellant Henson came into the picture.

Appellant Bridgman paid a monthly rental for his office space, kept separate books, employed his own help, and operated as an individual concern called the Bridgman Distributing Company [R. 229, 230].

The uncontradicted evidence shows that Defendant Earl H. Rhodes carried no social security or withholding taxes on any distributor; that each distributor traveled, and all expenses were borne by the distributors themselves [R. 239-241].

The only thing any distributor received was the difference between the purchase price and the amount he paid for the machine [R. 241, 242]. All distributors, including Henson and Bridgman, operated under the same contract.

The unfairness and the irony of the mass trial covering approximately 14 weeks is well illustrated by the fact that Appellant Henson had to sit in Court and listen to approximately 24 different Government witnesses from

various parts of the United States testify. Of said 24, only 4 mentioned Henson, to wit:

David McFarland who saw Henson only once [R. 87];

Lawrence Liebrand, who had never seen Henson in his life before [R. 1892];

Henry B. Wiesley, who identified Appellant Ernest H. Bridgman as Henson [R. 1809 and 1810]; and

The Los Angeles postal inspector, J. H. VanMeter, to whom Appellant Henson made said full, fair and complete disclosure [R. 5426 and 5428].

The Government has referred to Exhibit 27, on page 5 of their Brief, which concerns instructions to salesmen. In the first place, there were no salesmen, but each defendant was an individual contractor or distributor, and on June 30, 1948, at the trial, Defendant Rhodes testified in substance that he prepared Exhibit 27, but never sent it out to his knowledge to any distributor. The uncontradicted evidence throughout the entire trial was that Exhibit 27 was never received by any distributor, and never used by any distributor. In spite of this, on July 10, 1948, Exhibit 27 was read to the jury by Mr. Laven, Counsel for the Government.

With reference to the inconsistency of the verdicts, we have a situation as to all nine remaining defendants' motions for judgment of acquittal on 13 of the 18 counts, which were granted at the conclusion of the Government's case. At the final conclusion of the Government's case, Counts 3, 4, 7, 14 and 17 were submitted to the jury. Said 5 remaining counts cover the identical period of time from prior to August 14, 1945, and continuing to Novem-

ber 4, 1946; they also cover the identical essential elements of specific intent, one single scheme, as specifically described in Paragraph 1 of Count I, which is identical with Paragraph 1 of each and all of the remaining 17 counts, period for period and comma for comma. In short, the Court on 13 counts, and the jury on 4 counts, found Appellant Henson did not have the specific intent and that there was no single scheme, and in these 4 counts, we respectfully point out that the indictment and the facts as to the intent and the scheme were absolutely identical. Likewise, comparable to the letters in Counts 4 and 7, and all of Counts 3, 4, 7, 14 and 17, were introduced in evidence.

Appellant Henson is in this situation:

In 17 of the 18 counts, he had been found not to have the specific intent to defraud, and not to be a party in any scheme, 13 times by the Court and 4 times by the jury under absolutely identical pleadings, facts, transactions and dates. Yet, as to Count 7, under the identical set-up, we have one verdict of guilty. Can anyone reasonably say that said verdicts are consistent?

The same is true with Appellant Bridgman who was found not guilty 17 times and guilty once of Count 4 under said identical pleadings, facts, transactions and dates.

Certainly, the overwhelming weight of the evidence in so far as Appellant Henson is concerned points clearly and convincingly to the absence of any scheme and to the Appellant Henson's good faith and complete insufficiency of the evidence to prove bad faith, specific intent and said scheme. The question is then, how is it possible under these facts, to have a finding of guilty to Count 7? The

mass trial and guilt by association theory of the Government, covering 14 weeks of trial and concerning 20 Government witnesses, whom the Appellant Henson had never seen, met or heard before in his life, is the only logical, reasonable and plausible answer.

Where it is highly probable that error had substantial and injurious effect or influence in determining a jury's verdict, a reversal is required, notwithstanding that conviction would or might probably have resulted in a properly conducted trial.

Federal Rules of Criminal Procedure 52A, 28 U. S. C. A. 391;

Judicial Code Section 269;

U. S. v. Kotteakos, 328 U. S. 750, 66 Sup. Ct. 1239, 90 L. Ed. 1557.

So much for the facts. May I digress briefly on the theory. Respondent's brief presents a basis for affirmance of the verdicts rendered below—which we fear is sufficiently plausible that it might catch the judicial mind as a preferable alternative to a painstaking examination of the serious problems raised by appellants.

It is always easy for respondents to argue "There is sufficient evidence to support findings of guilt, the jury found guilt, *ergo* any errors committed the court below, however carefully they should be avoided, have not resulted in prejudice or in a miscarriage of justice. Hence, it follows, the judgments must be affirmed."

Right to Fair Trial.

But a realistic jurisprudence must regard a fair trial as of the essence. Even a correct result is a serious miscarriage of justice if the trial has been substantially unfair. We start with that premise. We cannot argue with anyone who does not grant it.

It is easy to dispose of a case in the manner suggested by counsel for the Government. If so done, a short opinion by the Court will be read by the profession in the advance sheets, and the probable mental comment will be, "Just another criminal appeal, no merit to it. Wonder why they appealed?"

On the other hand, if the Court comes to grips with the serious threat to our system of liberty and justice, which is implied in the nature of the proceeding below, we believe that the Court's opinion, although somewhat more lengthy, will prove a landmark in the extension and application of established common-law and Constitutional propositions, to a modern situation. We believe that reversal of this case on the grounds advanced will bring lasting credit to the American trial system and will be a long step toward elimination of the dangerous modern tendency to prove *guilt by association* through the mass trial technique.

For what did these defendants do? They were independent distributors. They beat the bushes to find customers for a new line of peanut-vending machines. Thousands, if not millions, of American citizens have earned, or tried to earn, their livelihood by this basic type of enterprise—salesmanship. A good salesman is, no doubt, seldom a paragon of virtue. Puffing is a legally recognized trait, to which no penalty attaches. Perhaps in

Utopia, a salesman would detail all the possible defects of his product, rather than using his talent and experience to stir up enthusiasm and demand, to close the deal. But such a Utopia would never have developed the vast economy which *laissez-faire* and *caveat emptor* built in America!

These men were convicted because of two documents which were transmitted through the mails, and we may, for argument only, assume that the jury found that somewhat untruthful statements were made by defendants to two individual customers.

These defendants did not even know each other. Each was convicted on the basis of a different document which passed through the mails. Yet, we are told that the majesty of our law allows the Government to force them to stand trial together—yea, with seven other independent distributors, each acting independently, for himself, and not for either appellant—for 14 weeks, for 59 trial days. What an ordeal! What an expense! Can the United States Government really do that to a business man merely because its bureaucrats believe that some untruthful statements were made in the course of a sale, in aid of which a document was transmitted through our mail channels?

And the jury—can any juror be expected to comprehend and recall the vast array of evidence of a 6,578-page transcript? And will inconsistent verdicts reaching impossible results be upheld on technical grounds, that by painstaking examination at that voluminous record, a trained lawyer can find that there was enough evidence for a reasonably logical man to believe that a particular piece of mailing matter was dropped in a postal box because

of a scheme to defraud? Or does the fact that Henson was acquitted of the count on which Bridgman was convicted, and Bridgman was acquitted of the count of which Henson was convicted, and no other defendants convicted at all, and several acquitted entirely [Clk. Tr. pp. 55, 57, 59, 63], and no verdict reached as to Rhodes (the only connecting link between the defendants) [Clk. Tr. p. 61], does that not prove conclusively that regardless of what amount of evidence of a "scheme" there was, the jury either disbelieved it or else failed utterly to comprehend the theory of the case?

Yet, the Government argues that the same Court which may set aside a civil verdict if the damages appear so excessive as to indicate passion or prejudice, has the duty to affirm verdicts such as were here rendered but which no sane man could honestly regard as fair and just!

For, if there was a scheme to defraud, Rhodes was the keystone of the arch. Without him there could be no scheme. Without him, you have wholly independent distributors operating in different areas, unknown to one another. Only if each man, operating under Rhodes, was operating for the purpose of defrauding his customers for his own benefit and that of Rhodes, can there be a scheme. For no one can rationally argue that Henson and Bridgman were, on the evidence, engaged in a joint scheme between themselves directly. Not even the jury was that confused, for it convicted each of a separate count of which it acquitted the other, Henson was doing nothing for Bridgman's benefit, Bridgman was doing nothing for Henson's benefit [Clk. Tr. pp. 56, 58].

The argument that the defendants were proved to be in one gigantic conspiracy is absurd (Resp. Br. pp. 17, 18).

Each defendant had business relations with Rhodes. The most that could be argued would be that Rhodes was engaged in eight separate conspiracies, one with each defendant.

But the jury rejected even that theory, by refusing to convict Rhodes of anything [Clk. Tr. p. 61; F. Clk. Tr. pp. 60-62].

And that is the kind of evidence on which the Government would argue that men should go to a penitentiary. Not if due process of law has any substance to it!

Let us look at the trial record! A vast array of witnesses paraded to the stand. Each was called against a particular defendant, reserving the right to offer the testimony against all defendants [*e. g.* R. 580].

In a two or three day prosecution, that practice might be tolerated. But what is the effect in a 14-week trial. For days and days, each defendant must, and did, listen to testimony about some other distributor of whom he never heard until he was indicted. He has no way to judge the truth and veracity of the witness, or the accuracy of his observation or memory. He has an attorney, paid to sit there and listen to it, but he cannot effectively consult with counsel about cross-examination or rebuttal, because he has no way to know how to defend himself against the testimony. *The only way he can be*

called upon to defend himself for what these strangers did is by the theory of guilt by association. Both defendants knew and did business with Rhodes, who also did business with other defendants, 70 or more distributors in all. Other than that, there was no evidence of combination, joint action, conspiracy, scheme, common plan, or other basis which the law has come to recognize as a legitimate foundation for requiring one man to defend himself against conduct committed by another fellow man.

The issue is clear. If this case can stand, then the seed is sown for guilt by association as a new development in American law, one fraught with even more unwholesome potentialities, which will in a short time lead to the undermining of all the cherished principles of our way of life.

In *Alford v. United States* (1931), 282 U. S. 687, 75 L. Ed. 624, 51 S. Ct. 77, a unanimous Supreme Court was persuaded that the essence of a fair trial was infringed when the trial court failed to allow defendant's counsel to establish on cross-examination that a certain prosecution witness was in Federal custody, and thus possibly biased. If the basis of a fair trial is undermined by such a relatively minor error on one trial court ruling, occupying only a few short minutes of time, *a fortiori,* it is respectively submitted, the trial below in this case was grossly unfair *in that for fourteen long weeks these defendants were forced to defend themselves against the insidious implications of responsibility for the conduct or misconduct of some other co-defendants.* If such a trial be fair, then

lawyers must revise their entire concept of the law of evidence, the due process clause, the speedy trial guarantee, and the basic precept of construction that "the enumeration in this Constitution of certain rights shall not be construed to deny or disparage others retained by the people" (Ninth Amendment, U. S. Const.).

In the case of *Schaeffer v. U. S. A.* (1920), 251 U. S. 466, 471, 64 L. Ed. 360, 362, the theory of guilt by association was at least partially rejected by the Supreme Court in its refusal to hold liable the President and Treasurer of a newspaper for items inserted in the publication without their express knowledge. These men had been convicted of conspiracy to engage in subversive activity, but acquitted of eight counts of specifically engaging in such activity. The case is also, thus, a case on inconsistent verdicts, though the opinion does not place the reversal on said grounds.

If "express knowledge" is the rational criterion, then on what basis can the Government suggest that Henson and Bridgman were responsible for the conduct and language used by other defendants and by each other? On what fair basis of fact were these defendants joined for trial en masse with the other seven defendants who were made to stand trial?

We believe that the *Schaeffer* case, cited *supra,* is also clear authority against the idea of proving a scheme or conspiracy by mere proof of association. Knowledge of the unlawful acts of the purported accomplices is an es-

sential ingredient of proof—and one which was completely lacking in the case of Bridgman and Henson. The majority of the Supreme Court reversed the conviction of Messrs. Schaeffer and Vogel, without detailed discussion of the evidence, but we quote the comment of Mr. Justice Brandeis, concurring in said reversal:

> "* * * there was no evidence of conspiracy except the cooperation of editors and business manager in issuing the publications complained of." (251 U. S. 483, 64 L. Ed. 367.)

This Circuit Court, we submit, should likewise strike down this attempt by the Government to create a conspiracy or scheme out of inferences of cooperation, out of coincidences, out of similar business methods, out of fertile prosecutorial imagination, and out of the very weakest kind of circumstantial evidence of utterly no probative value to any reasonable man. In a dissenting opinion, Mr. Justice Clarke points out that the conviction of the newspaper's bookkeeper, one Lemke, should also be reversed because he clearly had no control over the policy of what the newspapers printed, legally or illegally (251 U. S. 496, 64 L. Ed. 373). We borrow again this logic: what proof is there that Bridgman or Henson had any policy-control over the business methods of any other co-defendants? The answer is crystal clear: None, nay not even knowledge of the names, persons or methods of the others. Only Rhodes, who was not convicted, had any relationship at all, direct or indirect, with these defendants or the other defendants!

Prejudice.

Someone may answer that granting the error of the misjoinder and the mass trial, where is the prejudice? Because the jury acquitted each appellant of any participation in the misconduct, if any, of his co-defendants. But we submit that the proper test is that such an unfair trial should lead to reversal in every instance, if our fundamental right to a fair trial is to be preserved. And we call attention to the rule in the *Haupt* case (136 F. 2d 661) that there is serious doubt that the jury can give a fair trial on one charge where a mass of incompetent evidence is admitted. The same rule of prejudice was used by the Supreme Court in the *Blumenthal* case, 335 U. S. ....., 68 S. Ct. 248, 92 L. Ed. (A. O.) 183, at 190.

We submit that this proposition is vital: If A talks to B on a few days for a few hours and defrauds him of a few hundred dollars, and if those facts cannot be proved in a few days of trial time, then any fair system of justice would not allow conviction.

If it takes 14 weeks to prove that A defrauded B in a transaction which took only a few hours, then something is rotten in the state of our law on trial procedure.

This much is clear. It took 14 weeks because the government tried to prove these appellants guilty by association, by proving they were indirectly associated (without their knowledge) with other defendants who in turn made sales and representations to customers in other localities, all without and beyond these defendants' knowledge.

We call upon this Court, in all earnestness, to preserve, defend, and give substance to the great Anglo-American concept of a fair trial by holding explicitly that in these

United States the Government cannot conduct a mass trial of eight independently operating distributors, whose sole connecting link is through connection with a single manufacturer, also joined as a defendant, on the specious theory that all are joined in a single scheme to defraud; nor can that Government force American citizens to sit for fourteen weeks in a court room, under the heavy burden of expense to defend themselves, where the vast majority of the evidence offered concerns only separate, individual defendants, about which the co-defendants are unaware and unable to perceive any connection of it with themselves. For this Nation has not yet swept away the due process clause, nor the right to a speedy trial, nor the privileges and immunities of American citizenship, nor substituted for them the nefarious foreign ideologies which enshrine guilt by association as a proper test of criminality.

If this Court cannot, on this record, strike mortally at the trial-system involved below, or if it can uphold the inconsistent verdicts there reached as having done "substantial justice," then in the future all American business men would be wise to become pussy-footers, afraid to associate with any group, distributors who dare not sell but who only take unsolicited orders, merchants who make no statements about quality, and above all men who never use the mails.

It is one thing to prosecute a man for what he did himself. And if this case were broken into eight separate trials, each would be very short, if the evidence were limited to what each defendant did, plus any evidence the Government had to connect that defendant's fraud, if any, with a scheme of fraud centering on Rhodes. *And, after*

all, if such evidence would not convince a jury of said defendant's guilt, then is it fair that he be convicted?

We believe such separate trials would take only a few days each. If so, the total time would be less than the total of the trial below. And if the Government honestly believes it must require each defendant to answer for the conduct of co-defendants, of whom and of which he was not advised until trial, then we submit the Government is asking an unfair burden, and it is asking for the privilege of biasing the jury so that each man will not be convicted of his own fraud so much as of what the jury will come to regard as his inability to answer for the purported misbehaviour of other people whom he did not even know.

In all fairness, these men should either be convicted each of what he did himself, or acquitted. No man should be convicted of using the mail to defraud, because someone else he never heard of sent some mail containing untruths in attempts to sell similar merchandise to different customers in other areas. Even the jury, in their fantastically original inconsistency, seemed to realize, in part, this basic principle of fair-play.

Conclusion.

The mass trial of nine defendants for fourteen weeks on evidence, which taken in the strongest light against them, indicated eight separate, distinct schemes or combinations, defendant Rhodes engaging in each scheme with each other defendant, resulted in prejudice to appellants and in a miscarriage of justice in that, a vast array of evidence not connected with the appellant in any way was admitted against them by a blanket order of the trial court, in that appellants were thus subjected to a "Guilt

by Association" technique finding no warrant in Anglo-American jurisprudence and violative of the Fifth and Ninth Amendments, in that the numerous errors, detailed in appellants' opening brief, resulted in rendering the trial unfair, and in that the jury's verdicts and failure to reach verdicts as to other defendants establish conclusively that the jury was either completely confused by the erroneous mass trial or that they unreasonably or out of bias, prejudice, or passion, deliberately reached illogical conclusions.

Respectfully submitted,

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By ROBERT E. KRAUSE,

NOTE: This argument was written by counsel for Appellant Henson while being confined to a hospital bed in a full-length cast, with a multiple-fractured femur, following three months hospitalization before being operated on, and therefore, without the usual library privileges. The argument has been discussed with Mr. Bridgman's counsel and they have authorized their names to be joined to the signature.